SUPREME COURT OF KENTUCKY

82-Sc-221-D
(81-CA-1151-MR)

JAMES E. GAMBREL MOVANT

v. JEFFERSON CIRCUIT COURT
C55780, C237585, C238083

KENTUCKY BOARD OF DENTISTRY RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion of James E. Gambrel for a review of the decision of the Court of Appeals is denied.

Stephens, J., not sitting

ENTERED April 13, 1982.

Chief Justice

OPINION RENDERED: December 18, 1981;
10:00 a.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 81-CA-1151-MR

JAMES E. RENFRO, SR.
and JAMES E. GAMBREL APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES ANDERSON, JUDGE
Action Nos. C55780, C237585, C238083

KENTUCKY BOARD OF DENTISTRY APPELLEE

AFFIRMING IN PART -
REVERSING AND REMANDING IN PART

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BEFORE: WHITE, GANT and Howerton, Judges.

WHITE, JUDGE. This appeal arises from the Jefferson Circuit Court in which a

permanent injunction was entered against James E. Gambrel to prohibit him, under KRS Chapter 313, from the illegal practice of dentistry and in which James E. Renfro, Sr., was held in contempt for violation of a previously entered permanent injunction also relating to the illegal practice of dentistry.

Appellants have delineated in chronological form thirty-seven allegations of varying severity upon which to base reversal. It is unnecessary for this Court to address each individually as resolution can be had in summary form.

Appellants initially argue that their cases were consolidated over their objections and ex parte. Four

references to the record are made; however, none supports this contention. This Court is able to find neither that an Order consolidating the actions was entered nor that appellants leveled below any objections to the alleged consolidation. It would appear only that the Circuit Court heard and decided the cases together for its conveniences. No error on this matter preserved.

Trial before the Court was conducted through continuations on four separate dates stretching from May to July 1978. During the May 12 proceedings, for reasons best known to Franklin Yudkin, appellants' counsel, he absented himself from the courtroom and did not return that day. Additional witnesses were heard on behalf of the

Board of Dentistry against both Mr. Gambrel and Mr. Renfro; however, Mr. Yudkin was not present to participate in cross-examinations.

When the matter was resumed on June 2 motions for mistrial and for the striking of the testimony of these witnesses were denied; however, Donald White, a witness against Mr. Gambrel, was recalled for re-examination and cross-examination. Mr. White had been heard on May 12 while Mr. Yudkin was still in the courtroom, but no questions on cross were asked of him at that time.

On June 2 appellants argued against his recall by asserting that the Board was being allowed to present a witness after announcing closed. The hearing of additional testimony after closing is a

matter left to the discretion of the trial court. The opportunity to rehear Mr. White was one done in essence to allow appellants the cross-examination they previously had waived. Under those circumstances, appellants at that time did participate. There is no abuse of discretion. Town of Wingo v. Rhodes, 234 Ky. 385, 28 S.W.2d 465 (1930).

We shall not repeat the contents of Mr. White's testimony. We limit ourselves to the legal conclusion that such was sufficient to sustain the issuance of an injunction against Mr. Gambrel.

With regard to Mr. Renfro, the Circuit Court based its contempt holding upon the deposition testimony of Carolyn Snawder. Ms. Snawder, due to voluntary

commitment, was not present to offer testimony at trial, and the lower Court evidently accepted the deposition under CR 32.01(c)(x) relating to illness.

Nevertheless, the deposition offered was not taken in connection with the present proceeding but rather in one prosecuted against Ms. Snawder by James E. Renfron, Jr. CR 32.01 regarding the use of depositions speaks to use at trial "against any party who was present or represented at the taking." We do not question that the factual issues in the two actions were substantially the same and that Mr. Yudkin did serve as counsel for Mr. Renfro, Jr., at the proceeding as well as for Mr. Renfro, Sr., presently.

Clearly Mr. Renfro, Sr., was not a party to the trial for which Ms. Snawder's deposition was taken. Nor can it be said that his interests were represented there by Mr. Yudkin, for counsel's obligation at that time was not to him but to his son, a stranger to the present action.

The Circuit Court's acceptance of the Snawder deposition was in error as violative both of CR 32.01 and of the constitutional guarantee regarding one's right to confrontation of witnesses.

The Snawder deposition is the only testimony of record against Mr. Renfro which this Court has before it. Earlier in this opinion reference was made to adverse witnesses' being heard at the May 12 proceeding; however, we have

neither transcript nor narrative of that testimony.

It is true that within that filed before this Court is a document purporting to be a transcript from May 12. According to an exchange with the Court on June 23, this was taken from the personal tape recording of Mr. Yudkin and not by an Official Reporter. In June appellants attempted to have such introduced as part of the record; however, this request was properly denied. Mention then was made as an offer through avowal.

Under CR 43.10 an avowal is to serve to preserve that which a witness would have said had an objection to his testimony not have been sustained. It is obvious that this does not meet that standard.

CR 75.13 provides for a narrative statement to be prepared should no stenographic report of the trial be available. Nothing before us indicates that the May 12 "transcript" was ever offered to the Circuit Court for settlement and approval under that Rule.

The alleged May 12 transcript bears no markings that it was, for any purpose, made a part of the Circuit Court record, and its appearance before us is indeed suspect. Nevertheless, its exclusion inures to appellant Renfro's benefit. Eliminating the Snawder deposition and the testimony from May 12 which may or may not have adversely affected his interests, there remains nothing within the record upon which to sustain a contempt holding.

Accordingly, for all the aforementioned reasoning, issuance of an injunction under KRS Chapter 313 against James E. Gambrel is sustained. The contempt holding against James E. Renfro, Sr., is reversed and remanded with instructions to vacate.

ALL CONCUR.

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 81-CA-1151-MR

JAMES E. RENFRO, SR.
and JAMES E. GAMBREL — APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES ANDERSON, JUDGE
Action Nos. C55780, C237585, C238083

KENTUCKY BOARD OF DENTISTRY — APPELLEE

ORDER DENYING PETITION FOR REHEARING

BEFORE: GANT, HOWERTON and WHITE, Judges.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

ENTERED: FEBRUARY 26, 1982

JUDGE, COURT OF APPEALS

JEFFERSON CIRCUIT COURT

No. 237, 585 and 238, 083 THIRD DIVISION

KENTUCKY BOARD OF DENTISTRY PLAINTIFF

VS INJUNCTION

JAMES E. RENFRO, SR. AND JAMES E. GAMBREL DEFENDANTS

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Motion having been made and proof having been heard and the Court being sufficiently advised and made its Findings herein on the issue of a permanent injunction against James E. Gambrel prohibiting him from practicing dentistry illegally.

IT IS ORDERED AND ADJUDGED that James E. Gambrel is hereby restrained and permanently enjoined from forever hereafter within the geographical limits of the Commonwealth of Kentucky from

engaging in an act or acts which would constitute the practice of dentistry, unless or until James E. Gambrel shall have fully and legally qualified to so practice as defined by KRS 313.

IT IS FURTHER ORDERED that James E. Gambrel pay all costs herein expended.

This is a final appealable order and there is no just reason for delay.

Dated this 30th day of December, 1980.

CHARLES H. ANDERSON, JUDGE

JEFFERSON CIRCUIT COURT

No. 237, 585 and
No. 238, 083 THIRD DIVISION

KENTUCKY BOARD OF DENTISTRY PLAINTIFF

VS OPINION, FINDINGS OF FACTS
AND
CONCLUSIONS OF LAW

JAMES E. RENFRO, SR. AND
JAMES E. GAMBREL DEFENDANTS

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The matters herein having been heard on several different occasions and the parties herein having filed their Memorandum Briefs and the Court being sufficiently advised, the following is the Opinion, Findings of Facts and Conclusions of Law of the Court.

The two matters were consolidated in this Court and heard together on the Kentucky Board of Dentistry's Petition for permanent injunction against

James E. Gambrel for alleged illegal practice of dentistry and on the Kentucky Board of Dentistry's Motion to hold James E. Renfro, Sr. in contempt of Court for violation of a previous injunction prohibiting him from practicing dentistry illegally.

While the cases were pending decision, the parties on May 9, 1979, tendered an Agreed Order dismissing settled with prejudice as follows:

> "By Agreement of the Plaintiff and certain defendants in the above styled action and the Court being advised,
>
> IT IS ORDERED, that the claim of all Plaintiffs against Kentucky Dental Association Inc. and the Defendants named in the Complaint and Amended Complaint as "all licensed dentists in Kentucky" be and they hereby are, dismissed with prejudice, each plaintiff and the designated Defendants to pay his or its own costs.
>
> There is no just cause for delay, this is final as to the matters adjudicated by this Order."

Agreed to by James Gambrel individual and on behalf of the group designated "all other dental laboratory techinicions licensees" /s/ James Gambrel

Consumer Association of Kentucky Inc.
by: /s/ Franklin S. Yudkin

Citizens for Denturism in Kentucky, Inc.
by: /s/ Brenda Leist Snider, acting president

Citizens for Denturism in Kentucky, Inc.
by: /s/ Franklin S. Yudkin

HAROLD RAY DRUIN (no signature - deceased)

Attorney for Consumer Association of Kentucky, Inc.: /s/ Franklin S. Yudkin

Kentucky Dental Association, Inc.
by: /s/ President (could not read signature)

and by Counsel for Kentucky Dental Association, Inc. and defendants designated as "all licensed dentists in Kentucky: /s/ John T. Ballantine."

As a result of the above Agreed Order and telephone conversations to secretary indicated by note of September 12, 1980, the Court was of the impression that the matter had been disposed of until recently otherwise advised by counsel for individual members of the Kentucky Board of Dentistry, John T. Fowler.

The case originated with the Petition for Injunction and supporting Affidavits filed by attorney Donald White against James Gambrel dated December 5, 1977. The Affidavit and testimony during the trial indicates that on or about May 19, 1977, Donald White visited the dental laboratory known as Gambrel Denture Studio located at 1208 Durrett Lane, Louisville,

Jefferson County, Kentucky. Mr. White's testimony is that he visited Gambrel's studio to request that a partial plate be made for him. He further testified that James E. Gambrel took impressions of his teeth, placed his hands in his mouth for examination, all without a work order or prescription from a licensed dentist. There is no testimony that a licensed dentist was on the premises at the time of Mr. White's examination by James E. Gambrel.

The testimony also is that at the completion of the examination of Mr. White by Mr. Gambrel, Mr. Gambrel quoted Mr. White a fee for services of $175.00 for the dental work.

Defendant, Gambrel, is opposing these allegations offers evidence that

no actual money was every paid for the teeth. Further, that James E. Gambrel had authority to take impressions of the human teeth because he was a licensed dental laboratory technician and so authorized pursuant to KRS 313.510. Defendant also raised question concerning entrapment. It appears from the evidence and this court finds that Donald White was an associate of Lowell V. Thompson, attorney for the Kentucky Board of Dentistry during the time he visited Defendant's dental laboratory.

The action against James E. Renfro, Sr. is that he violated a previously entered permanent injunction prohibiting him from the practice of dentistry. The testimony offered

against James E. Renfro is that Carol Sue Snawder was treated by James E. Renfro, Sr. without an authorized prescription from a licensed dentist. The evidence indicates that James E. Renfro, Sr. was not a licensed dentist and did not have a work order from a licensed dentist nor was there a licensed dentist on the premises during the time of Carol Sue Snawder's examination.

The Court is of the opinion and finds that James E. Gambrel saw Donald White as a "patient" on or about May 19, 1977, at Gambrel's Denture Studio at 1208 Durrett Lane, Louisvile, Jefferson County, Ky.

Further, that James E. Gambrel took impressions of Mr. White's teeth, placed

his hands in the mount of Donald White and made a partial plate for Donald White and quoted him a fee of $175.00 for the services.

The Court further finds that Donald White did not have a work from a licensed dentist nor was James E. Gambrel a licensed dentist practicing dentistry in the State of Kentucky in accordance with the law.

Further, that there was not a licensed dentist on the premises at the time of Donald White's visit. The Court further finds that regardless of the fact that no money actually exchanged hands there was offered services of a dental nature or of a dentist for a fee to be paid in the future.

The Court further finds that James E. Gambrel is not a "licensed" dental laboratory technician pursuant to Statute, but that he is a registered dental laboratory technician pursuant to KRS 313.510 and as a registered dental laboratory technician James E. Gambrel does not have authority under the Statute to make impressions of the human teeth or to construct the fabrication of any intraoral appliance without the written order or prescription from a licensed dentist.

The Court is of the opinion and further finds that there is insufficient evidence for a finding of entrapment.

As to James E. Renfro, Sr., the evidence clearly establishes that James E. Renfro, Sr. treated Carol Sue

Snawder without a work order or prescription from a licensed dentist, neither was there a licensed dentist on the premises. The Court finds that James E. Renfro was not a dentist licensed to practice dentistry in the State of Kentucky.

Therefore, the Court finds that James E. Renfro, Sr. violated the terms of his previous injunction which prohibited him from practicing dentistry illegally.

The Court concludes that pursuant to KRS 313.010:

> "Any person shall be regarded as practicing dentistry" who, for a fee, salary or other reward paid, or to be paid either to himself, or to another person, performs or advertises to perform, dental operations of any kind, or who diagnoses or treats diseases or lesions of human teeth or jaws, or attempts to correct malpositions

thereof, or who diagnoses or treats disorders, or deficiencies of the oral cavity and adjacent associated structures, or who takes impressions of the human teeth or jaws to be used directly in the fabrication of any intraoral appliance, or shall construct, supply, reproduce or repair any prosthetic denture, bridge, artificial restoration, appliance or other structure to be used or worn as a substitute for natural teeth, except upon the written order or prescription of a licensed dentist and constructed upon or by the use of casts or models made from an impression taken by a licensed dentist,..."

The Court further concludes that a registered dental laboratory technician has no authority to charge a fee, salary or reward paid or quote a fee to be paid at some point in the future unless he has a work order from a licensed dentist or that there is a licensed dentist on the premises. Further, that a registered dental laboratory technician

should not take impressions of the human teeth or jaws to be used directly in the fabrication of any intraoral appliance without the work order or prescription from a licensed dentist.

The Court also concludes as a matter of law, pursuant to KRS 313.010, that James E. Gambrel violated KRS 313.010 when he practiced dentistry on Donald White. Further, the evidence shows clearly by Mr. Gambrel's activity that he will continue to practice dentistry without authority and that the public interest of health and welfare requires that he be restrained.

The Court further concludes that James E. Renfro, Sr. did violate the terms of his prevously entered permanent injunction of June 2, 1961 by making

impressions of teeth without a work order or prescription from a licensed dentist or without a licensed dentist being on the premises.

Now, therefore, a permanent injunction shall be entered gainst James E. Gambrel, individually, prohibiting James E. Gambrel from violating KRS 313.010 Subsection 2. Further, the Court concludes that James E. Renfro, Sr. is in violation of the Court's permanent injunction of June 2, 1961, which prohibited him from practicing dentistry illegally and, consequently, James E. Renfro, Sr. shall be fined $500.00 and an injunction entered against James E. Gambrel and an

Order assessing penalty of $500.00 fined agaist James E. Renfro, Sr.

Dated this 30th day of December, 1980.

CHARLES H. ANDERSON, JUDGE